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No. 376

In the

Supreme Court of the United States

October Term, 1965

UNITED STATES OF AMERICA for the Use and Benefit of KELLER PIER DRILLING COMPANY, an Ohio Corporation,

Petitioner,

vs.

JOHN H. EISELE COMPANY, INC., an Ohio Corporation, THE BUCKEYE UNION CASUALTY CO., AMERICAN RE-INSURANCE CO.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THOMAS F. LAZARON, ESQUIRE
of THOMAS & LAZARON,
2456 Fulbourne Drive,
Cincinnati, Ohio 45231

HERBERT BASS,
402 Atlas Bank Building
524 Walnut Street
Cincinnati, Ohio 45202
Attorneys for Petitioners

COURT INDEX PRESS, INC. — Law Printers — 809 Walnut Street, Cincinnati, Ohio 45202

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THE BUCKEYE UNION CASUALTY CO.,
AMERICAN RE-INSURANCE CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

The petition of the above Petitioner is for a Writ of Certiorari to issue to review in part the judgment of the Court of Appeals for the Sixth Circuit of the United States, numbered 16,521, entered April 22, 1966 vacating the judgment of the United States District Court for the Southern District of Ohio, Dayton, Western Division entered January 11, 1965 and requiring arbitration, and shows to this court:

OPINIONS BELOW

The judgment by order of the District Court of the United States for the Southern District of Ohio in case numbered 3023 filed January 11, 1965 and the judgment of the Court of Appeals of the United States for the Sixth Circuit numbered 16,521 vacating the U. S. District Court's decision and remanding for stay for arbitration, filed January 11, 1965 have not been reported.

A copy of the judgment of the United States District Court judgment is appended to this Petition as Appendix A; a copy of the judgment of the Circuit Court of Appeals for the United States Sixth Circuit is appended hereto as Appendix B.

JURISDICTION

Jurisdiction of this court to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit made and entered April 22, 1966 is invoked under Section 1254 (1) of Title 28, United States Code. On that date the Court of Appeals vacated the judgment of the District Court dismissing the suit of Use Plaintiff but confirmed the decision of the District Court requiring arbitration and remanding and staying the case for such. The questions here presented are raised in the pleadings of the parties in the District Court and the Court of Appeals, except as to the application of the Fifth and Thirteenth Amendment which are here raised as a subsidiary question which must be settled as an incident of determining the issues raised in the lower courts.

QUESTIONS PRESENTED

1. Where the Respondent (General Contractor) inserted unilaterally all of the terms, conditions and provi-

sions of the government Contract DA-15-029-ENG-6241 into the subcontract, making it a part thereof and Petitioner subject thereto and it to have precedence over any conflicting provisions of the balance of the subcontract, and the government contract required Administrative remedies for relief to prevail over a conflicting provision for arbitration and Respondent breached its requirements to seek administrative relief for Petitioner or itself, and breached its obligation to use arbitration and arbitrarily settled its and Petitioner's claims, must Petitioner exhaust its administrative remedies before suit therefore under Title 40, Section 270 (b), Miller Act?

2. Was Respondent estopped by its conduct of its own acts and deemed to have waived its rights to governmental administrative remedies, and for arbitration as to its first subcontract with Petitioner?

3. Was Respondent by its acts and unlawful discharge of Petitioner, and waiver of administrative relief and right of arbitration so as to permit the second contract not requiring administrative relief or arbitration, and the special demand and urgings of Respondent to Petitioner to continue to perform after discharge on an implied in fact contract for quantum meruit basis, estopped to deny such two subsequent contracts were separate and new contracts for additional work, and recovery of claims therefor permissible under the 'Miller Act'?

4. Where the Respondent required Petitioner to use its equipment, its officer and employees to perform labor in a different capacity than originally agreed to after firing of Petitioner, and under threat to collect another subcontractor's unreasonable costs under bond of Petitioner, was there a deprivation of the liberty of contract and of property of the Petitioner, and of the officer and the employees of it without due process, and a taking of such

private property to a public use without just compensation and a violation of the Fifth Amendment of the United States, and the same acts to be deemed acts of slavery and involving involuntary labor and violating the Thirteenth Amendment to the United States Constitution, Section 1 thereof?

5. Was the public policy of Congress enacting Title 40, Section 270 (a) (d) (The Miller Act) to further implement the guaranteed protections of the Fifth and Thirteenth Amendments to the U. S. Constitution?

6. Was Title 9, Sections 2, 3, 4, applicable to a case not involving interstate commerce nor a maritime contract but a suit involving federal contract procurement law where Respondent never invoked such law as to require arbitration thereunder and Petitioner never waived its rights to jury trial, and discovery procedure to obtain evidence in possession of the Respondent and the U. S. government?

7. Where the subcontractor is ignorant of the requirements of work and is laboring under misrepresentations as to conditions of work known to the other party and the conditions of work vastly exceed those as represented, can such subcontractor waive in advance his rights to a judicial determination thereof by contract, as well as the right of the United States government to determine its own rights, and submit its rights and those of the sovereign to arbitration?

8. Was the right to administrative relief or arbitration of the rights of Petitioner under its first and whole subcontract, its second contract and third contract for quantum meruit adequate and a complete remedy for relief?

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED

The constitutional and statutory provisions and pertinent text are set forth in Joint Appendix and are: Article III, Section 2, U. S. Constitution; Title 40, Section 270 b (b) U. S. Code; Title 28, Section 1345 U. S Code; Title 9, Section 2, 3, 4, U. S. Code; Title 28, Section 1352 U. S. Code; and the following Constitutional provisions relevant as subsidiary issues are: Fifth Amendment, set forth in Appendix C; Thirteenth Amendment, Sections 1 and 2 set forth in Appendix D hereto.

STATEMENT OF THE CASE

This petition seeks review in part of the judgment of the U. S. Court of Appeals for the Sixth Circuit filed April 22, 1966 remanding the case and ordering a stay for arbitration. The case involves the drilling or pier holes and supervision of pouring of Respondent's concrete by Petitioner supplying labor therefor, in construction of the Air Force Institute Building of the United States government at Wright Patterson Air Force Base, Dayton, Ohio under a subcontract calling for arbitration and which by express terms made such subcontract subservient to the conflicting terms of the general governmental standard procurement contract DA-15-029-ENG-6241, and Petitioner subject to all the terms, conditions and provisions of such governmental contract which Respondent unilaterally inserted into such subcontract; however Respondent never delivered a copy of such government contract to Petitioner thereby Petitioner was unaware of certain obligations placed on it as well as many of its rights and privileges thereunder; Petitioner also suffered certain misrepresentations as to conditions of work and was induced to enter into the contract on

certain promises of Respondent. After commencing work the enormity of the substrata changed conditions were discovered by Petitioner who notified Respondent. Respondent refused to listen to the claims of Petitioner and Respondent urged Petitioner to work, labor and supervise as well as its officer to labor and supervise, and its employees to labor under unreasonable conditions because of vast amounts of underground as well as surface water, increased costs to Petitioner never agreed to, errors caused by Respondent requiring correction by Petitioner at extra costs of use of equipment, and labor and supervision. That Respondent claiming Petitioner breached its contract demanded a bond of Petitioner which it supplied; Respondent orally agreed with another contractor on March 3, 1963 to hire such contractor to replace Petitioner, then notified Petitioner by letter dated March 7, and delivered March 11, 1963 of the cancellation of the work of Petitioner and "fired out" Petitioner. Subsequently, it ordered Petitioner to correct a hole caused by Respondent by a separate latter authorization, having no reference to arbitration or administrative relief, on a time and material basis; it also at the same time demanded Petitioner return to the job and assist the other subcontractor complete the work halted also by extreme adverse weather. Petitioner had to incur additional labor costs, maintenance of insurance and performed under changed conditions than originally contracted to perform. It worked from March 11, 1963 through April 3, 1963 and commenced correction of the hole on March 27th, 1963 and completed such April 3, 1963. The Respondent threatened to charge the costs of the new subcontractor to Petitioner over objections of petitioner, who performed 90% of the work where as Respondent billed Petitioner for the 10% of the work performed by the substituting contractor at the approxi-

mate sum of $12,000.00 and refused to pay Petitioner for the work performed by petitioner before unlawful discharge, as well as for the corrective work and the demand and request for the additional performance after the unlawful discharge where no arbitration or administrative relief was involved. The Petitioner never waived any of its rights and continued to object to the Respondent refusing to heed its demands for performance by Respondent under the contract, as well as the "firing out" and the settling arbitrarily the demands of Respondent against Petitioner. Petitioner sought Respondent to exert itself for Petitioner as to its rights under the contract but Respondent refused to institute or permit Petitioner to institute a claim for just compensation under the federal administrative remedy for relief. The Petitioner being obligated to follow the terms of the government as to changed conditions, giving notice of changed conditions of work as well as comply with the disputes clause would have breached its contract if it had attempted to institute arbitration proceedings in the first instance, and when it attempted to institute administrative remedies, the Respondent refused and the contracting officer refused to meet with representatives of Petitioner because there was no privity of contract between the U. S. government and Petitioner. When Respondent finally refused to permit Petitioner to use administrative remedies and never demanded arbitration, Petitioner sued for its statutory relief under the Miller Act, the last day before a year expired from last day of performance, setting up its various rights under the 'whole' subcontract. Thereafter Respondent filed a motion to stay pending arbitration but never filed a petition for such under Title 9, Sections 1, 2, 3, and 4, thereof; but Respondent acknowledged the various claims of Petitioner but contended such arose out of the subcontract. The

joint Appendix of the parties, pages 33a through pages 35a set forth the said motion, the order of the court to Petitioner to show cause why the complaint should not be dismissed entered June 9, 1964, and pages 35a through page 60a set forth the basis for Petitioner's claim for jurisdiction. The joint appendix does not contain the memorandum of Respondent opposing Petitioner. The District Court by its order filed January 11, 1964 dismissed the complaint and required the parties to resort to arbitration. See Joint Appendix 61a. The Petitioner filed its notice of Appeal to the Circuit Court of Appeals for the Sixth Circuit, February 5, 1965. See Joint Appendix page 62a. An oral argument to the Circuit Court of Appeals was made by Petitioner and Respondent on April 16, 1966 and the Court made and entered its order vacating the judgment of the District Court and remanding the case to the lower court and to stay proceedings pending arbitration. The Petitioner seeks to review in part the judgment of the Court of Appeals for the Sixth Circuit of the United States requiring arbitration of the three contracts of Petitioner and its rights thereunder.

BASIS FOR JURISDICTION OF THE U. S. DISTRICT COURT

The Petitioner filed its complaint before the expiration of one year from date of last day of work performed by it, on April 3, 1964 with the U. S. District Court for the Southern District of Ohio, Western Division, Dayton, Ohio under the provisions of Title 40, Section 270 (a) and (b).

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

The petitioner contends that the decision of this case is contrary to the decision of the Supreme Court of the United States in holding that Arbitration must apply to the three separate claims of Petitioner where no interstate commerce and no maritime contracts were involved and where no petition was filed therefor pursuant to the requirements of the Arbitration Act, Title 9, Sections 1, 2, 3, and 4 of the U. S. Code even though Petitioner has not waived its right to trial by jury and must resort to federal discovery procedure to secure evidence known to be in the possession of the U. S. government contracting officer as well as the Respondent. The Supreme Court in its decision contained in the case of *Norman C. Bernhardt* v. *Polygraphic Co. of America,* 350 U. S. 198; 76 S. Ct. 73 held such arbitration act applied only to matters involving the movement of interstate commerce and maritime contracts. Therein it also stated that, in addition to other matters, the right to have a federal court give its construction as to matters of law as an aid to a jury are important. This case involves a narrow construction of Federal law peculiar only to U. S. government procurement contracts not usual and not clearly understood by the usual arbitrator not versed in government contract law.

This decision of the Circuit Court of Appeals conflicts with the decision of the Supreme Court in the case of *U. S.* v. *Holpuch Co.,* 328 U. S. 701, 1001; which held that where appeal procedure are clearly inadequate one could avoid exhausting administrative remedies.

The Court of Appeals decision conflicts with the Supreme Court decision in the case of *U. S.* v. *Grace & Sons, Inc.* (June 6, 1966) reported in *CCH. U. S. Supreme Court Bulletin, B-1897* confirming *H. B. Zachary Co.* v. *U. S.,*

344 F. 2nd. 352; *U. S.* v. *Blair,* 321 U. S. 820; *Southeastern Oil Co.* v. *U. S.,* 115 F. Supp. 198; *C. J. Langenfelder & Sons, Inc.* v. *U. S.,* 341 F2nd. 600, that where one had no full and adequate remedy, one need not exhaust his administrative remedies; and that in *Blair* v. *U. S. supra* a subcontractor not having privity of contract could not recover for additional expenses against the United States government.

This decision of the Court of Appeals conflicts with that of the 4th Circuit in *U. S. et al.* v. *Alcon Development Corporation,* 271 F.2nd. 904 which held proper the filing of a motion to stay for arbitration, also an answer, and a petition for arbitration under Title 9, Sections 1, 2, 3, and 4 U. S. Code.

The decision of the Circuit Court of Appeals conflicts with that of the Supreme Court as to each of the separate claims of Petitioner in *Atkinson* v. *Sinclair Refining Co.,* 82 S. Ct. 1318, 370 U. S. 238 which held that where there is no agreement for arbitration one need not submit to arbitration.

This decision of the Circuit Court of Appeals is contrary to that of the Circuit Court of Appeals for Tennessee in *Union of Electric, Radio & Machinists Workers A.F.L.-C.I.O.* v. *Collins Radio Company* which held the above also that it is the duty of the Court to determine whether the reluctant party breached its duty to arbitrate.

There is a substantial constitutional question whether the Miller Act was enacted to further the purposes of Section 2 of the Thirteenth Amendment, as well as the Fifth Amendment to the U. S. Constitution so that a party may waive any tort committed against it and sue under an implied in fact contract for quantum meruit recovery following the requirement of work and labor by an employing contractor to its subcontractor, its officer and employees

after an unlawful discharge; also the right of the laborers to recover the reasonable value of increased costs following discovery of true conditions of work where costs were vastly increased and the terms of the whole contract were contradictory with each other. This issue has never been presented before under the Miller Act and if the decision of the lower court were not reversed, it would permit the United States government to become unintentionally a party to a violation of the Fifth and Thirteenth Amendments to the U. S. Constitution. The settling of the issues pleaded by Petitioner and in settling those must be considered the subsidiary constitutional issues included here, particularly the right of parties to waive their rights to be free of slavery and involuntary servitude and to be deprived of rights of private property and liberty of contract, whether directly or indirectly, and contrary to the intention of the constitutional safeguards and policy of the "Miller Act", particularly where the party has no knowledge of the facts and did not intend to thusly waive its such rights, or the future rights of the sovereign as to the forum.

That as to the decision below interpreting a requirement for arbitration where there was no contract for such and the right to administrative relief was as illusory as the right to arbitration as to the Petitioner, leaves an important question in law uncertain and the determination by this court of these important matters of federal law will promote uniformity as to the rights of subcontractors and those supplying services and labor to the United States government when such government must perform certain functions as a sovereign for the benefit of the whole nation and the protection of its citizens and to secure such needed services and labor as well as materials at the lowest cost to the government.

WHEREFORE, IT IS RESPECTFULLY SUBMITTED that this petition for Writ of Certiorari to review

the judgment of the United States Court of Appeals for the Sixth Circuit should be granted.

THOMAS F. LAZARON, ESQUIRE
of THOMAS & LAZARON,
Attorneys for Petitioners
2456 Fulbourne Drive,
Cincinnati, Ohio 45231

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT
Southern District of Ohio, Western Division
Dayton, Ohio

Civil Action No. 3023

(CAPTION OMITTED)

ORDER OF UNITED STATES DISTRICT COURT

(Filed January 11, 1965.)

On June 9, 1964 the Court issued an order for the use plaintiff to show cause why this action should not be dismissed. Subsequently the use plaintiff filed a memorandum which was responded to by defendants. The Court has carefully considered this matter and concludes that this action should be dismissed.

The Court is compelled to reach this conclusion because of the broad arbitration clause which is contained in the original contract. That clause provides:

> "*Any* controversy or claim arising out of or relating to this contract, *or the breach thereof,* shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be en-

tered in any Court having jurisdiction thereof." (Emphasis added).

Accordingly, the use plaintiff's complaint is hereby DISMISSED and the parties shall proceed with arbitration.

.....

Chief Judge U. S. District Court

APPENDIX B

UNITED STATES COURT OF APPEALS
For The Sixth Circuit

(CAPTION OMITTED)

(Filed April 22, 1966)

ORDER

Before WEICK, Chief Judge, O'SULLIVAN and CELEBREZZE, Circuit Judges.

We agree with the District Court that the parties are required to arbitrate their controversy in accordance with the arbitration clause in the contract. The motion filed by defendants in the District Court was to stay the action pending arbitration, and not to dismiss it.

The judgment of dismissal entered by the District Court is accordingly vacated and the cause is remanded with instructions to stay the action pending the arbitration proceedings.

Entered by order of the Court.

/s/ Carl W. Reuss, Clerk

APPENDIX C

United States Code Annotated – CONSTITUTIONAL AMENDMENTS 1-5, page 297

AMENDMENT V. CAPITAL CRIMES; DOUBLE JEOPARDY; SELF INCRIMINATION; DUE PROCESS JUST COMPENSATION FOR PROPERTY.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces; or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation.

APPENDIX D

United States Code Annotated – CONSTITUTIONAL AMENDMENT 6-14, page 269

AMENDMENT XIII. SLAVERY ABOLISHED.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject their jurisdiction.

Section 2. Congress shall have the power to enforce this Article by appropriate legislation.

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STATEMENT OF DOCKET ENTRIES

4/3/64	Complaint filed.
4/6/64	Summons issued with copies of complaint to U. S. Marshal for service.
4/27/64	Defendants' motion filed.
4/29/64	Summons returned executed and filed. Marshal's fee $9.72.
6/9/64	Order — Plaintiff to file memo within 15 days.
6/24/64	Plaintiff's memo opposing motion of defendant.
7/2/64	Defendants' memo in opposition to use-plaintiff's memo.
1/11/65	Order — Plaintiff's Complaint dismissed; to proceed with arbitration filed.
2/5/65	Notice of appeal filed.
2/5/65	Bond of appeal filed.
2/12/65	Entry — Plaintiff's action dismissed to which use Plaintiff excepts filed.

Civil Action No. 3023

UNITED STATES DISTRICT COURT
for the
Southern District of Ohio
Western Division, Dayton, O.

UNITED STATES OF AMERICA
for the use and benefit of KELLER PIER DRILLING CO., an Ohio Corporation,

Plaintiff,

vs.

JOHN H. EISELE COMPANY, INC.,
an Ohio Corporation;
THE BUCKEYE UNION CASUALTY CO.;
AMERICAN REINSURANCE CO.,

Defendant.

COMPLAINT

(Filed April 3, 1964.)

FIRST CLAIM

1. Jurisdiction of this cause is conferred by Section 270 (a) and (b) of Title 40 of the United States Code.

FIRST COUNT

2. On or about the 30th day of November 1962 the Defendant, John H. Eisele Company, Inc., entered into written contract with the United States of America where-

by the said Defendant John H. Eisele Company, Inc., agreed to furnish all the labor and materials and to perform all work required for the construction of the AIR FORCE INSTITUTE OF TECHNOLOGY building at Wright-Patterson Air Force Base, State of Ohio, for the consideration of $2,665,218.00. A copy of the said contract, except as to drawings and specifications is attached hereto as Exhibit A.

3. Pursuant to the Act of Congress approved August 24, 1935, the Defendant, John H. Eisele Company, an Ohio corporation having its principal office at Columbus, Ohio, as Principal and the Defendants, the American Reinsurance Co. having an office at 99 John Street, New York, New York, and The Buckeye Union Casualty Co., an Ohio corporation having an office at 1111 East Broad Street, Columbus, Ohio, as sureties on or about the 30th day of November, 1962 duly executed a standard government form of payment bond to the United State of America, wherein and whereby the Defendant John H. Eisele Company, Inc. and Defendants, American Reinsurance Co., and The Buckeye Union Casualty Co., as sureties, bound themselves jointly and severally in the sum of $1,066,087.20, conditioned that if the principal shall promptly make payment to all persons supplying labor and materials in the prosecution of the work provided in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety is hereby waived, then this obligation to be void; otherwise to remain in full force and virtue.

4. The said bond was duly accepted by the United States of America; and upon such acceptance, the contract for the construction and completion of the building aforementioned was awarded to Defendant John H. Eisele Company, Inc.

5. In order to obtain the performance of the work required under the said contract, the Defendant John H. Eisele Company, Inc. entered into a sub-contract with Keller Pier Drilling Co., an Ohio corporation for the doing of certain drilling of holes for piers using drilling equipment and the pouring of concrete to form the said piers which work by the said use, Plaintiff was necessary to the performance of Defendant, John H. Eisele Company, Inc. contract with the United States and which use Plaintiff agreed to perform in consideration of the payment to use Plaintiff of $5,780.00 plus $2.00 per cu. yard of concrete poured; by defendant John H. Eisele Company, Inc. A copy of said sub-contract is attached hereto as exhibit B.

6. Thereafter this use Plaintiff, performed the said labor and work and furnished equipment to drill said pier holes and supervised the pouring of said concrete to form the piers necessary as required under the contract between the United States and Defendant John H. Eisele Company, Inc., which labor and work and use of equipment and supervision of concrete so poured was performed by use Plaintiff, commencing on the 12th day of February, 1963, during the months of February, March and April, and was terminated on April 4, 1963 by Defendant John H. Eisele Company, Inc.

7. The defendant John H. Eisele Company, Inc. failed and neglected to pay to the use Plaintiff the said sum of $5,780.00 plus $2.00 per cubic yard of poured concrete according to its sub-contract.

8. One year has not elapsed from the date of final payment of the contract and although due demand has been made upon the defendant, John H. Eisele Company, Inc. no part of said sum of $5,780.00 plus $2.00 per cu. yard of poured concrete, with interest has been paid to the use Plaintiff.

9. All of said work and labor and use of drilling equipment and supervision of pouring concrete was performed within the said Southern District of Ohio.

Wherefore, the United States of America for the use and benefit of Keller Pier Drilling Co. demands judgment against the defendants in the sum of $5,780.00 plus $2.00 per cu. yard of concrete poured, with interest from the 4th day of April 1963 and the costs of this action.

SECOND COUNT

1. Use Plaintiff repeats and realleges each and all of the allegations contained in paragraphs 1, 2, 3, 4, 5, of the First Count of Claim numbered First with like effect as if herein fully repeated.

2. That under the terms of said sub-contract, Defendant Eisele Company, Inc. was required to set off each situs of each hole to be drilled by use Plaintiff, and said Defendant, John H. Eisele Company, Inc. by its special instance and written request made known to use Plaintiff its promise to pay use Plaintiff a reasonable sum of money on a time and material basis for correction of a pier hole location, said sum to be in addition to the said sub-contract price.

3. That use Plaintiff commenced the correction of said pier hole on March 27, 1963 and completed said correction on April 2, 1963 at the reasonable value for said work and labor and use of equipment in the sum of $385.21.

4. The defendant, John H. Eisele Company, Inc. failed and neglected to pay use Plaintiff the said sum of $385.21 according to its written request.

5. One year has not elapsed from date of final payment of the contract and although due demand has been made on defendant, John H. Eisele Company, Inc. no part of

said $385.21 with interest has been paid to use Plaintiff.

6. All of said work and labor for correction said pier hole location and drilling with equipment was performed within said Southern District of Ohio.

Wherefore, the United States of America for the use and benefit of Keller Pier Drilling Company demands judgment against defendants in the sum of $385.21 with interest from the 4th day of April, 1963 and costs of the action.

SECOND CLAIM

1. Jurisdiction of this cause is conferred by Section 270 (a) and (b) of Title 40 of the United States Code.

THIRD COUNT

2. Use Plaintiff repeats and realleges each and all of the allegations contained in paragraphs numbered 2, 3, 4, of the First Count of Claim numbered First of this complaint with like effect as if herein fully repeated.

3. In order to obtain the performance of the work required under the said contract the Defendant, John H. Eisele Company, Inc. entered into a sub-contract with Keller Pier Drilling Co. an Ohio corporation for the drilling of certain pier holes using drilling equipment and supervising the pouring of concrete to form the said piers which work by the use Plaintiff was necessary to the performance of Defendant, John H. Eisele Company, Inc. and which use Plaintiff offered to perform in consideration of the payment of $5,780.00 plus $2.00 per cu. yard of concrete poured. That use Plaintiff agreed to perform said work provided Defendant, John H. Eisele Company, Inc. removed overhead electrical wires.

4. Use Plaintiff was not furnished a copy of the prime contract nor specifications governing same which were in-

corporated into the sub-contract awarded use Plaintiff, a copy of which is attached hereto as Exhibit B, and use Plaintiff did not know the method of pouring concrete required a vibration method thereby increasing to use Plaintiff the costs of such labor and work.

5. That no time was specified as to commencement date or completion date in use Plaintiff's sub-contract, but he offered to commence work on February 12, 1962 with the approval of Defendant, John H. Eisele Company, Inc.

6. That Defendant, John H. Eisele Company, Inc. induced use Plaintiff to purchase workmen's compensation insurance, public liability insurance and property damage insurance and to incur certain other expenses in attempting to fulfill the requirements of said sub-contract aggregating in cost of $7,752.15 to use Plaintiff.

7. That although the contract of use Plaintiff and Defendant John H. Eisele Company, Inc. incorporated the provisions of the prime contract of said defendant and the United States government and use Plaintiff would have been excused from performing said work because of the extremes of adverse weather, said Defendant urged use Plaintiff to exert more time and effort than was required under said sub-contract all of which use Plaintiff complied with.

8. Use Plaintiff further urges upon information and belief that because of the adverse weather prohibiting construction, in order to expedite the construction of said pier holes said Defendant failed and neglected to give use Plaintiff three days prior notice of defendant's determination that use Plaintiff was derelict in its obligation and said Defendant negotiated with another sub-contractor on or about March 3, 1963 to supplant use Plaintiff three days before said Defendant notified use Plaintiff of its said decision contrary to defendant's obligation.

9. Use plaintiff says that said Defendant failed and neglected and refused to remove overhead electric wires for use plaintiff as agreed thereby causing great delay to use plaintiff in moving its equipment from situs to situs with drilling boom lowered.

10. Use Plaintiff further says that he was induced to enter into negotiations for such work on the representation that the substrata would be merely damp, free of large boulders, whereas and in fact, water drained into each hole so drilled, necessitating excessive use of pumping equipment beyond normal requirements and causing additional unforseen costs, due to "remucking" of drilled, water filled holes at great expense to use Plaintiff.

11. That approximately four days after defendant John H. Eisele Company, Inc. negotiated a written agreement with such other sub-contractor, said defendant informed use Plaintiff of its decision to bring additional men and equipment in and charge the same to the expense of use Plaintiff, all at an unreasonable price of $40 per cu. yard of concrete poured.

12. That despite said defendant's notification to use Plaintiff of its determination to cancel the balance of use Plaintiff's contract, said defendant urged use Plaintiff to continue to exert its capabilities to complete such work and to incur other and greater expense.

13. Use Plaintiff further alleges that defendant, John H. Eisele Company, Inc. was required to stake out drilling situs which in certain instances were inaccurately staked and center not accurately indicated, all to the great delay and expense to use Plaintiff.

14. That despite the repudiation of the obligation of defendant under its sub-contract with use Plaintiff on March 7, 1963 and due to the urgings both before and after said date, use Plaintiff had fully performed all obligations on its part to be performed and at the time of said re-

pudiation was ready, willing and able and duly offered to continue the due performance thereof.

15. That defendant, John H. Eisele Company, Inc. failed, neglected and refused to pay to use Plaintiff the said sum of $5,780.00 plus $2.00 per cu. yard of concrete poured, and said defendant failed, neglected and refused to pay any other or further amounts said defendant agreed to pay for additional work or to reimburse use Plaintiff the sum of $7,752.15 which use Plaintiff reasonably incurred at said Defendant's special urging and requests, although use Plaintiff made demand on said defendant for reimbursement and compensation.

16. That use Plaintiff's agreement has not reached its termination date and one year has not elapsed from the date of final payment of the agreement and urgings of Defendant John H. Eisele Company, Inc. and although due demand has been made on defendant John H. Eisele Company, Inc., no part of the reasonable value of use Plaintiff's work, labor, equipment, or costs have been paid.

17. That the value of $7,752.15 was reasonable which use Plaintiff expended on account of defendant John H. Eisele Company, Inc. and which was expended and labor performed in the Southern District of Ohio.

Wherefore, the United States of America for the use and benefit of Keller Pier Drilling Co. demands judgment against the defendants in the sum of $7,752.15 with interest from the 4th day of April, 1963 and costs of this action.

/s/ Thomas F. Lazaron
Thomas & Lazaron by Thomas F. Lazaron
a member of the firm
Attorneys for Keller Pier Drilling Co.
Office and Post Office address
105 Rookwood Bldg. 1077 Celestial St.
Cincinnati 2, Ohio

STATE OF OHIO)
COUNTY OF HAMILTON) SS:

Wilbur Keller, being duly sworn deposes and says that he resides at 4774 Jessup Street, Cincinnati, Ohio, that he is the president of Keller Pier Drilling Co., an Ohio corporation the use Plaintiff herein; and that he has read the foregoing complaint and knows the contents thereof, that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes them to be true.

Wilbur Keller, President

Sworn to and subscribed before me this 2nd day of April, 1964.

Ernest V. Thomas, Jr., Notary Public
Hamilton County, Ohio

EXHIBIT A

CONSTRUCTION CONTRACT

Contract No. DA-15-029-ENG-6241
Date of Contract 30 November 1962
Name and Address of Contractor
JOHN H. EISELE COMPANY, INC.
18 E. 41st Street
New York 17, New York
Corporation, incorporated in the State of Ohio
Department or Agency
U. S. Army Engineer District, Louisville
Corps of Engineers, U. S. A.
P. O. Box 59, Louisville 1, Kentucky
Contract for (Work to be performed)
Construction of Air Force Institute of Technology
Place
Wright-Patterson Air Force Base, Ohio
Contract Price (Express in words and figures)
Two Million Six Hundred Sixty-Five Thousand Two Hundred Eighteen and No/100 Dollars. ($2,665,218.00) Estimated
Administrative Data (Optional)
To be paid by Special Disbursing Agent (Military Funds), U. S. Army Engineer District, Louisville, Corps of Engineers, USA, 830 West Broadway, Louisville 3, Kentucky from the following funds:
57X3300 377-6513 P 321-32 S 15-029 (BAN 3-288)

The United States of America (hereinafter called the Government), represented by the Contracting Officer executing this contract, and the individual, partnership, joint venture, or corporation named above (hereinafter called the Contractor), mutually agree to perform this contract in strict accordance with the General Provisions (Standard

Exhibit A

Form 23-A), Labor Standards Provisions Applicable to Contracts in Excess of $2,000 (Standard Form 19-A), and the following designated specifications, schedules, drawings, and conditions:

Specifications: Serial No. ENG-15-029-63-11 as amended by Amendment Nos. 1, 2 and 3 thereto.

Drawings: As listed in Paragraph SC-3 of the Specifications as amended by Amendment No. 2 thereto.

General Provisions: Std. Form 23-A (April 1961) as modified by continuation sheets Nos. 5 through 16.

Unit Price Schedule: Attached hereto and made a part hereof.

Work Shall Be Started

Within 10 calendar days after date of receipt by contractor of Notice to Proceed.

Work Shall Be Completed

In accordance with the provisions of paragraph SC-1 of the Specifications.

Alterations. The following alterations were made in this contract before it was signed by the parties hereto:

Article 28 of General Provisions deleted.

In witness whereof, the parties hereto have executed this contract as of the date entered on the first page hereof.

THE UNITED STATES OF AMERICA

/s/ James L. Lewis 28 Dec. 62

James L. Lewis, Col., CE

District Engineer

Contracting Officer

CONTRACTOR

John H. Eisele Company, Inc.

James Conforti, Jr.

President

* * *

Exhibit A

GENERAL PROVISIONS
(Construction Contract)

* * *

4. CHANGED CONDITIONS

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions.

5. TERMINATION FOR DEFAULT – DAMAGES FOR DELAY – TIME EXTENSIONS

* * *

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

Exhibit A

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its soverign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay.

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

(e) If, after notice of termination of the Contractor's right to proceed under the provisions of paragraph (a) of this clause, it is determined that the delay is excusable under the provisions of paragraph (d) of this clause, such notice of termination shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. (This paragraph (e) applies only if this contract contains such termination clause.)

* * *

Exhibit A

6. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive. This provision shall not be pleaded in any suit involving a question of fact arising under this contract as limiting judicial review of any such decision to cases where fraud by such official or his representative or board is alleged: *Provided, however,* that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance o fthe contract and in accordance with the Contracting Officer's decision.

* * *

22. TERMINATION FOR CONVENIENCE OF THE GOVERNMENT. (JAN. 1961)

(a) The performance of work under this contract may be terminated by the Government in accordance with this

clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall:

* * *

(iv) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

* * *

(ix) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

* * *

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph

(d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Contracting Officer shall, subject to any Settlement Review Board approvals required by Section VIII of the Armed Services Procurement Regulation in effect as of the date of execution of this contract, determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination and shall pay to the Contractor the amounts determined as follows:

(i) with respect to all contract work performed prior to the effective date of the Notice of Termination, the total (without duplication of any items) of —

* * *

(B) the cost of settling and paying claims arising out of the termination of work under sub-contracts or orders as provided in paragraph (b) (v) above, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the Notice of Termination of work under this contract, which amounts shall be included in the cost on account of which payment is made under (A) above; and

* * *

25. GRATUITIES. (MAR. 1952)

* * *

(c) The rights and remedies of the Government provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

(ASPR 7-104.16)

Exhibit A

40. PRIORITIES, ALLOCATIONS, AND ALLOTMENTS. (JAN. 1961)

* * *

Subparagraph (d)(1) and paragraph (e) of General Provision 5, entitled "Termination for Default — Damages for Delay — Time Extensions," have been deleted and the following are substituted therefor:

"(1) The delay in the completion of the work arises from causes other than normal weather beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from causes other than normal weather beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and" (ECI 7-602.5)

"(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was excusable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause." (ASPR 8-709)

* * *

Exhibit A

21. NONDISCRIMINATION IN EMPLOYMENT. (JUL 1962)

* * *

(g) The Contractor will include the provisions of the foregoing paragraphs (a) through (f) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor.* The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

* The President's Committee on Equal Employment Opportunity interprets the first sentence of paragraph (g) to mean that the Contractor will include the provisions of the foregoing paragraphs (a) through (f) in every first-tier subcontract or purchase order, so that such provisions will be binding upon each such subcontractor or vendor, and will require each first-tier subcontractor or vendor similarly to include the provisions of paragraphs (a) through (f) in any subcontract or purchase order which he places, unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order 10925 of March 6, 1961. (ASPR 12-802)

* * *

Exhibit A

2. WORK HOURS ACT OF 1962 – OVERTIME COMPENSATION.

* * *

(a) No Contractor or subcontractor contracting for any part of the contract work shall require or permit any laborer or mechanic to be employed on such work in excess of eight hours in any calendar day or in excess of forty hours in any workweek unless such laborer or mechanic received compensation at a rate not less than one and one-half times his basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek whichever is the greater number of overtime hours.

(b) In the event of any violation of the provisions of paragraph (a) the Contractor and any subcontractor responsible for such violation shall be liable to any affected employee for his unpaid wages. In addition such Contractor or subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provisions of paragraph (a) in the sum of $10 for each calendar day on which such employee was required or permitted to work in excess of eight hours or in excess of forty hours in a work-week without payment of the required overtime wages.

(c) The Contracting Officer may withhold or cause to be withheld from moneys payable on account of work performed by the Contractor or subcontractor the full amount of wages required by this contract and such sums as may administratively be determined to be necessary to satisfy any liabilities of such Contractor or subcontractor for liquidated damages as provided in paragraph (b).

* * *

Exhibit A

LABOR STANDARDS PROVISIONS
Applicable to Contracts in Excess of $2,000

* * *

7. SUBCONTRACTS – TERMINATION

The Contractor agrees to insert Clauses 1 through 7 hereof in all subcontracts and further agrees that a breach of any of the requirements of these clauses may be grounds for termination of this contract. The term "Contractor" as used in such clauses in any subcontract shall be deemed to refer to the subcontractor except in the phrase "Government Prime Contractor."

EXHIBIT B

INSERTION PAGES 2-A, 2-B and 2-C by GENERAL CONTRACTOR ARE PART OF THIS CONTRACT.

STANDARD FORM OF SUBCONTRACT

* * *

CONTRACT 251-3

THIS AGREEMENT made this SIXTEENTH day of JANUARY in the year NINETEEN HUNDRED and SIXTY-THREE by and between KELLER PIER DRILLING CO., 4774 Jessup Street, CINCINNATI 39, OHIO hereinafter called the Subcontractor and JOHN H. EISELE COMPANY, Inc. (OHIO) hereinafter called the Contractor. WITNESSETH, That the Subcontractor and Contractor for the consideration hereinafter named agree as follows:

SECTION 1. The Subcontractor agrees to furnish all material and perform all work as described in Section 2 hereof for Air Force Institute of Technology for The United States of America hereinafter called the Owner, at Wright-Patterson Air Force Base, Ohio in accordance with the General Conditions of the Contract between the Owner and

Exhibit B

the Contractor and in accordance with Supplementary General Conditions, the Drawings and the Specifications prepared by Giffels & Rossetti, Inc. and U.S. Army Engineer District, Louisville Corps of Engineers, Louisville, Kentucky hereinafter called the Architect, all of which General Conditions, Drawings and Specifications, signed by the parties thereto or identified by the Architect, form a part of a Contract between the Contractor and the Owner dated, November 30th, 1962, and hereby become a part of this Contract.

SECTION 2. The Subcontractor and the Contractor agree that the materials to be furnished and work to be done by the Subcontractor are: For furnishing all labor, tools, equipment and supervision required to complete all the work called for under Section 4 of the specifications entitled — "MACHINE-DRILLED PIERS" and/or as shown on the drawings.

Concrete will be furnished by General Contractor but Sub-contractor will pour same in place.

Any load test on piers or concrete test to be responsibility of General Contractor.

Subcontractor subject to the approval of the Architects and Owners.

General Contractor to set any steel or bolts that go into piers, to do any forming that need be done on piers above ground level and laying off of piers.

SECTION 3. The Subcontractor agrees to complete the several portions and the whole of the work herein sublet by the time or times following: Work to start within two (2) days' notice.

SECTION 4. The Contractor agrees to pay the Subcontractor for the performance of his work the sum of Five Thousand Seven Hundred and Eighty Dollars ($5,780.00) PLUS — Two Dollars ($2.00) per cubic yard for pouring

of concrete, in current funds, subject to additions and deductions for changes as may be agreed upon, and to make payments on account thereof as follows:

TERMS OF PAYMENT: 85% on the 20th of the month for all work performed at the project during the previous month provided always however, that the Contractor shall not be required to pay Subcontractor for any work performed unless and until the Owner has actually paid the Contractor therefore; balance to be paid thirty (30) days after final approval and acceptance by the Architects and Owners.

If piers are over or under the depths specified, ADD or DEDUCT. $2.00 per lin. ft. and For pouring concrete — ADD $2.00 per cu. yd.

SECTION 5. The Contractor and Subcontractor agree to be bound by the terms of the Agreement, the General Conditions, Drawings and Specifications as far as applicable to this subcontract, and also by the following provisions: The Subcontractor agrees—

a) To be bound to the Contractor by the terms of the Agreement, General Conditions of the Contract, the Supplementary General Conditions, the Drawings and Specifications, and to assume toward him all the obligations and responsibilities that he, by those documents, assumes toward the Owner.

b) To submit to the Contractor applications for payment in such reasonable time as to enable the Contractor to apply for payment under Article 24 of the General Conditions.

c) To make all claims for extras, for extensions of time and for damage for delays or otherwise, to the Contractor in the manner provided in the General Conditions of the Contract and Supplementary General Conditions for like claims by the Contractor upon the Owner, except that the time for making claims for extra cost is one week.

Exhibit B

The Contractor agrees—

d) To be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the Agreement, General Conditions of the Contract, the Supplementary General Conditions, the Drawings and Specifications, and by all the provisions thereof affording remedies and redress to the Contractor from the Owner.

e) To pay the Subcontractor, upon the payment of certificates, if issued under the schedule of values described in Article 24 of the General Conditions, the amount allowed to the Contractor on account of the Subcontractor's work to the extent of the Subcontractor's interest therein.

f) To pay the Subcontractor, upon the payment of certificates, if issued otherwise than as in (e), so that at all times his total payments shall be as large in proportion to the value of the work done by him as the total amount certified to the Contractor is to the value of the work done by him.

g) To pay the Subcontractor to such extent as may be provided by the Contract Documents or the subcontract, if either of these provide for earlier or larger payments than the above.

j) To pay the Subcontractor a just share of any fire insurance money received by him, the Contractor, under Article 29 of the General Conditions.

k) To make no demand for liquidated damages or penalty for delay in any sum in excess of such amount as may be specifically named in the subcontract.

l) That no claim for services rendered or materials furnished by the Contractor to the Subcontractor shall be valid unless written notice thereof is given by the Contractor to the Subcontractor during the first ten days of the calendar month following that in which the claim originated.

m) To give the Subcontractor an opportunity to be present and to submit evidence in any arbitration involving his rights.

Exhibit B

n) To name as arbitrator under arbitration proceeding as provided in the General Conditions the person nominated by the Subcontractor, if the sole cause of dispute is the work, materials, rights or responsibilities of the Subcontractor; or if, of the Subcontractor and any other subcontractor jointly, to name as such arbitrator the person upon whom they agree.

The Contractor and the Subcontractor agree that—

o) In the matter of arbitration, their rights and obligations and all procedure shall be analogous to those set forth in this Contract.

Nothing in this article shall create any obligation on the part of the Owner to pay or to see to the payment of any sums to any Subcontractor.

GENERAL CONTRACTORS ADDITIONAL INSERTIONS

1. The Standard Form of the General Conditions of the Contract of the American Institute of Architects, 1958 Edition, is made a part of the Specifications and of the Contract, and shall govern the execution of the work and all questions arising thereunder, except where stated to the contrary on pages 2A and 2B herein.

2. The Contractor shall have the right at any time to require the Subcontractor to furnish a bond covering the faithful performance of the Agreement and the payment of all obligations thereunder, in such form and amount as the Contractor may prescribe and with such sureties as it may approve. If such bond is required by instructions given previous to the submission of bids, the premium shall be paid by the Subcontractor; if subsequent thereto, it shall be paid by the Contractor.

3. Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by

Exhibit B

arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

4. The Subcontractor shall gather together all rubbish caused by his work, broom clean the floors, and remove his rubbish from the premises. On completion of his Work, the Subcontractor shall remove from and about the building, all tools, scaffolding, equipment and surplus or waste materials pertaining to his Work.

5. Since time is of the essence of this contract, all work shall proceed with all possible speed, so as not to delay the progress of construction an any way whatsoever.

6. The Subcontractor must have sufficient men, materials and equipment on the job at all times in order to properly carry on the work (in the judgment of the Contractor.) Should the Subcontractor at any time delay the progress of the work (in the judgment of the Contractor), then the Contractor has a right to hire men and equipment and buy all necessary materials in order to carry on the work properly, and charge all costs involved in doing so to the Subcontractor, it being only necessary for the Contractor to notify the Subcontractor by means of the "three days' notice" by registered mail to the Subcontractor's address, in order to exercise the above-mentioned right.

7. If, in the opinion of the Contractor, it is necessary for the Subcontractor to work overtime or to work more than one shift in order to complete the job within the stipulated completion date, this overtime work shall be performed by the Subcontractor without expense to the Contractor.

8. All labor used in connection with this work must be satisfactory to the Contractor and of such character as will not cause any conflicts with any other trades on the work.

Exhibit B

Should any labor be employed on the job that is unsatisfactory to the Contractor (in the Contractor's opinion), such labor must be discharged upon notification to the Subcontractor to do so by the Contractor.

9. The Subcontractor must be responsible for any damage to his work from any and all causes until its acceptance by the Contractor and Architects.

10. The Subcontractor agrees to, and shall, immediately upon demand of the Contractor and/or Owner, and at the expense of the Subcontractor, repair and/or replace, in a manner satisfactory to the Architect, any and all work furnished by the Subcontractor which may have become defective, due to faulty materials and/or workmanship, and/or due to unsatisfactory functioning of plant and/or equipment, furnished hereunder, for which he is at fault, within ..... year from the date of completion of the Work. The Subcontractor, further agrees to and shall pay for all damage to the building resulting from defects in his work and all expenses necessary to remove, replace and/or repair, in a satisfactory manner, any other work which may be damaged and/or disturbed in making repairs to the Work included in this guarantee.

11. It is understood that the General Contractor is not to be held responsible for any delays in the progress of the work or for any additional cost caused thereby regardless of whether these delays are caused by the Owner, Architect, General Contractor or Subcontractor and/or any other delays or for other reasons.

12. The Contractor shall be at liberty from time to time, whether the work or any part thereof shall or shall not have been completed, to make changes, and/or omissions in the work as he may deem necessary, upon written order to the Subcontractor. When the amount of the debit or credit has been agreed upon the Contractor shall

issue a written order to the Subcontractor stating the amount to be added to or deducted from the Contract Price.

13. Any extra orders authorized by the Contractor on a time and material basis will not be paid by the Contractor unless Subcontractor obtains vouchers signed by the Contractor's authorized job representative at the end of each day. These vouchers to show the exact time spent, labor rates, quantities and cost of materials used. These time and material extra orders to be billed to the Contractor at actual cost plus ten percent (10%) to cover other costs, expenses and profit of the Subcontractor.

14. It is understood that should there be an increase in wages and/or materials during the life of this contract, the additional cost of same is to be paid for by the Subcontractor without additional cost to the Contractor.

15. The Subcontractor shall not sub-let, assign or transfer this agreement or any part of the work included herein or any moneys to become due hereunder, without the written consent of the Contractor.

16. The Subcontractor is to have monthly requisition in office of Contractor on the last day of each month for all work performed during that month; otherwise it may not be possible for Contractor to consider Subcontractor's requisition for payment. The Subcontractor agrees to submit on demand by the Contractor, with his first requisition a complete detailed statement of the contract amount correctly sub-divided and equally balanced into the various items comprising this contract to be used only as a basis of calculating the payments due.

17. The Subcontractor is to furnish the Contractor with receipted bills or other evidence of payment for any and all labor, materials, and supplies used by this Subcontractor in the performance of his work. The Contractor reserves the right to withhold any payments due the Subcontractor

until such receipted bills, or other satisfactory evidence of payments are presented to the Contractor.

18. If at any time there shall be evidence of any lien or any other claim of any kind or description for which the Contractor or the said premises may become liable, and which is chargeable to the Subcontractor or his subcontractors, and/or when damages shall be caused by this Subcontractor to another subcontractor's work, then the Contractor shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient, in the opinion of the Contractor, to completely indemnify the Contractor against any such lien or claim. If there shall prove to be any such lien or claim after all payments are made, the Subcontractor shall refund to the Contractor all moneys that the latter may be compelled to pay in discharging or disposing thereof and of any other claim made in consequence of the Subcontractor's default, and this Agreement shall not be affected by the final payment.

19. The Subcontractor, for the contract price herein provided for, hereby accepts and assumes exclusive liability for, and shall hold the Contractor harmless against the payment of:

(a) All contributions, taxes or premiums which may be payable under the Unemployment Insurance Law of any State or under the Federal Social Security Act, measured upon the payroll of employees, by whomsoever employed, engaged in the performance of the work included in this contract.

(b) All sales taxes levied or assessed against the Owner, the Contractor or the Subcontractor arising out of the furnishing or installing by the Subcontractor hereunder of any kind of personal property.

20. The Subcontractor is to furnish to the Contractor Certificates showing that he is covered on this contract with the following Insurance:

Exhibit B

(a) Workmen's Compensation in accordance with the laws of the State of Ohio.

(b) Public Liability Insurance in the limits of $250,000, for each person and $500,000, for each accident.

(c) Property Damage in an amount not less than $50,000.

(d) Contractors' Protective Public Liability Insurance, with an individual limit of $250,000, and a total limit for any one accident $500,000, for the account of the Subcontractor when the Subcontractor sublets to another any portion of the work undertaken under this Agreement.

(e) Contingent Property Damage Insurance in an amount not less than $50,000.

Certificates of Insurance must be at the Contractor's office before Subcontractor commences work.

21. The Subcontractor hereby agrees to indemnify and save harmless the owner and the general contractor from and against any and all loss and/or expense which they, or either of them, may suffer or pay as a result of claims, settlements, suits, judgments or damages due to, because of, or arising out of any and all injuries to, or death of, any and all persons including the subcontractors employees and for any and all damage to property, caused by or resulting from or arising out of or in connection with the contract and/or the prosecution of the work thereunder whether due to the acts or omissions of the owner, or the acts or omissions of the general contractor, or the acts or omissions of any other contractor, or the acts or omissions of any other person, firm, partnership, association or corporation, or otherwise.

22. The Subcontractor shall defend all suits or claims for infringement by him of any patent rights that may be brought against the Contractor and/or the Owner arising out of the Work contemplated by this Agreement, and shall save the Contractor and/or Owner harmless from loss on

account thereof, except that the Subcontractor shall not be responsible for such loss when particular process or product of a particular manufacturer or manufacturers is specified in the Contract Documents.

23. Should Subcontractor elect to store materials and/or equipment on the sidewalk or street at his own risk it shall be his duty to properly stack same in a neat and orderly manner and to install and maintain such protection lights as are required.

24. Paragraphs (g), (h) and (l) of Section 5 are superceded as follows: Payments shall be set forth in Section 4. Claims or changes by contractor shall be valid at anytime before final payment is made to the subcontractor.

25. There are incorporated by reference in this subcontract, with like force and effect as if the same were stipulated herein at length, all of the terms and conditions of the contract between the general contractor and The United States of America, dated November 30, 1962 and bearing Contract No. DA-15-029-ENG-6241. Wherever there shall be any discrepancy or difference in terms or provisions between the said general contract and the standard form of general conditions of the contract of the American Institute of Architects 1958 edition (together with these general contractors additional insertions as modified), then, and, in such event, the provisions of the general contract between the general contractor and the said United States of America, shall govern.

26. The subcontractor agrees to perform this contract in strict accordance with the General Provisions (Standard Form 23-A, April 1961, pages 1 thru 16 inclusive), Labor Standards Provisions (Standard form 19-A), and the following designated specifications, schedules, drawings, and conditions:

SPECIFICATIONS: Serial No. ENG-15-029-63-11 as amended by Amendment Nos. 1, 2 and 3 thereto.

Exhibit B

DRAWINGS: As listed in Paragraph SC-3 of the Specifications as amended by Amendment No. 2 thereto.

27. PRIORITY RATING DO-C2.

Certified for national defense use under DMS Regulation 1.

Subcontractor is required to follow the provisions of DMS Reg. 1, and of all other applicable regulations and orders of BDSA in obtaining controlled materials and other products and materials needed to fill this order.

28. This project is exempt from Ohio State Sales Tax. Exemption Certificate is attached to this contract.

29. All shop drawings and samples, certificates of compliance with the Specifications, and payroll reports should be sent to contractors Ohio Office located at 111 East Main Street, New London, Ohio.

30. Certificates of Compliance with Federal Specifications as indicated in the specifications will be required by each supplier of material for the job and reference should be made to the Section and the Paragraph of the specifications to which such compliance is intended. This certification should be signed by an official of the manufacturer.

SECTION 6.

Agreement between
..... Subcontractor
..... Contractor
..... Owner
..... Architect
Contract Price $.....

IN WITNESS WHEREOF the parties hereto have executed this Agreement, the day and year first above written.

JOHN H. EISELE COMPANYInc.
By: John P. NELSON, Vice President
KELLER PIER DRILLING CO.
By: WILBUR S. KELLER, Pres.
(Title)

IN THE UNITED STATES DISTRICT COURT
Southern District of Ohio, Western Division
Dayton, Ohio

Civil Action No. 3023

(CAPTION OMITTED)

MOTION
(Filed April 27, 1964.)

Now come the defendants and respectfully move this Court that the above styled action and all proceedings herein be stayed until an arbitration shall be had in accordance with the terms of the contract entered into between the use plaintiff and defendant, John H. Eisele Company, Inc.

For the grounds of this motion, defendants respectfully direct the Court's attention to Paragraph No. 5 in the use plaintiff's complaint wherein the use plaintiff alleges a contract between said plaintiff and the defendant John H. Eisele Company, Inc., and attaches a copy of said contract to its complaint marked "Exhibit B". The Court is then referred to the said "Exhibit B" and specifically Paragraph No. 3 of the said "Exhibit B" which reads as follows:

> "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof."

The use plaintiff's complaint alleges certain transactions occurring between the use plaintiff and defendant John H. Eisele Company, Inc., which give rise to the claim as set

forth in the use plaintiff's complaint filed the third day of April, 1964, under the above style. All of said transactions set forth in use plaintiff's complaint arose out of or relate to the aforesaid contract.

The use plaintiff has not at any time asked or demanded of the defendant John H. Eisele Company, Inc., that it proceed to arbitrate any alleged claim, dispute, or right it may have, if any, by reason of the matters and alleged facts set forth in the complaint herein, nor has the defendant John H. Eisele Company, Inc., failed, neglected, or refused to proceed to arbitrate any of such alleged claims.

The defendants, therefore, claim that under and pursuant to the provisions of the said contract set forth in the complaint of the use plaintiff as "Exhibit B", and the statutes of the United States in such cases made and provided therefor, this Court is without jurisdiction to proceed upon, or determine the alleged cause of action set forth in the complaint herein, and that the alleged action set forth in the complaint is prematurely brought.

WHEREFORE, defendants herein pray that an order may be entered by this Honorable Court staying the action and all proceedings herein until an arbitration shall be had in accordance with the terms of the contract entered into between the use plaintiff and defendant John H. Eisele Company, Inc.

(DULY SIGNED WITH CERTIFICATE OF SERVICE.)

(CAPTION OMITTED)

ORDER OF UNITED STATES DISTRICT COURT
(Entered June 9, 1964.)

Now comes the Court and notes that defendants have filed a motion to stay all proceedings until an arbitration is held in accordance with the terms of the contract entered into between the use plaintiff and defendant John H. Eisele Company, Inc. It appears to the Court that the filing of this law suit was premature and accordingly the use plaintiff shall file a memorandum within 15 days showing cause why this action should not be dismissed.

CARL A. WEINMAN
Chief Judge, U. S. District Court

(CAPTION OMITTED)

MEMORANDUM OF USE PLAINTIFF OPPOSING THE MOTION OF DEFENDANTS FOR A STAY OF PROCEEDINGS AND FOR ARBITRATION, FILED APRIL 27, 1964; AND PURSUANT TO ORDER OF COURT ENTERED JUNE 9, 1964

COMPLAINT
(Filed June 24, 1964.)

The complaint filed April 3, 1964 contains two claims against the Defendant herein.

FIRST CLAIM containing two counts, alleged jurisdiction of the cause conferred upon the court by Title 40, Sections 270a and 270b of the United States Code.

1. The second paragraph thereof alleged construction contract DA-15-029-ENG-6241 between JOHN H. EISELE COMPANY, INC. DEFENDANT and THE UNITED STATES OF AMERICA, U. S. ARMY ENGINEER

CORPS, LOUISVILLE DISTRICT, for construction of an Air Force Institute of Technology building at Wright Patterson Air Force Base, at the contract price of $2,665,-218.00, and represented by Exhibit A attached.

2. Third paragraph thereof alleged Defendants AMERICAN REINSURANCE COMPANY and THE BUCKEYE UNION CASUALTY CO., as sureties and DEFENDANT JOHN H. EISELE COMPANY, INC. as principal, executed a standard form of payment bond to the United States government wherein such sureties would remain liable for the amount of said bond if the named principal failed to make promptly payments to all persons supplying labor or materials.

3. Fourth paragraph thereof alleged acceptance of such bond by the United States government.

4. Fifth paragraph thereof alleged execution of sub-contract 251-3 by DEFENDANT JOHN H. EISELE COMPANY, INC. and USE-PLAINTIFF KELLER PIER DRILLING CO., attached thereto as Exhibit B and dated January 16, 1963.

5. Section 1 of such sub-contract required Use-Plaintiff to *"supply material and perform all work as described in Section 2 thereof for the United States of America* (thereinafter called the *Owner*), at Wright Patterson Air Force Base, Ohio, *in accordance with the general conditions of the contract between such Owner and JOHN H. EISELE COMPANY, INC. therein named Contractor, and in accordance with Supplementary General Conditions, the Drawings and Specifications prepared by Grifels & Rossetti, Inc., and U. S. Army Engineer District, Louisville Corps of Engineers, Louisville, Kentucky thereinafter called Architects, all of which General Conditions, Drawings and Specifications, signed by the parties thereto or identified by the Architect, form a part of the contract be-*

tween the Contractor and the Owner dated November 30th, 1962 *and hereby become a part of this contract".* (emphasis added)

6. Section 2 of such subcontract stated "Subcontractor subject to approval of the Architects and Owners".

7. Exhibit B reflects the *unilateral action of the Defendant Contractor* inserting *without special notice to Use-Plaintiff* of pages 2-A, 2-B *preprinted* pages, and the *specially typed page* 2-C and making such subcontract subject to said such pages.

8. Exhibit A (Contract # DA-15-029-ENG-6241) made a part of such subcontract provides in: Section 2: Specifications; and Drawings; Section 4: Changed Conditions; Section 3: Changes; Section 5: Termination for default-damages for delay, Time Extension; Section 6: Disputes; Section 9: Materials and Acceptance; Section 10: Inspection and Acceptance; Section 21: Nondiscrimination in Employment, certain exclusive procedure for government of the parties thereto as to terms, conditions and performance and obligations.

9. Section 1 of Page 2-A inserted by Defendant Contractor states:

> "The Standard Form of the General Conditions of the Contract of the American Institute of Architects . . . is made a part of the Specifications and of the contract and shall govern the execution of the work and all questions arising thereunder, except where stated to the contrary on pages 2A and 2B herein."

10. Section 3 of said insertion states:

> "Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the

award rendered by the Arbitrator(s) may be entered in any court having jurisdiction thereof."

However, specially typed continuation of page 2-B (entitled 2-C) inserted solely by Defendant Contractor into such sub-contract states:

"25. There are incorporated by reference in this subcontract, *with like force and effect as if the same were stipulated herein at length, all of the terms and conditions of the contract between the general contractor and the United States of America, dated November 30th,* 1962 *and bearing contract No. DA*-15-029-*ENG*-6241. *Wherever there shall be any discrepancy or difference in the terms and provisions* thereof *between the said general contract and the standard form of general conditions of the contract of the American Institute of Architects* 1958 *edition (together with these general contractors additional insertions as modified), then and, in such event, the provisions of the general contract between the general contractor and the said United States of America, shall govern.*"

"26. *The subcontractor agrees to perform this contract in strict accordance with the General Provisions (Standard Form 23-A, April* 1961, *pages* 1 *through* 16 *inclusive)* Labor Standards Provisions (Standard form 19-A), and the following designated specifications,

Additionally Section 5 of the said sub-contract states:

schedules, drawings, and conditions . . ."

"The *contractor* and *subcontractor agree to be bound* by the *terms of the Agreement, the General Conditions, Drawings, and Specifications* as far as applicable to this subcontract, *and also by the following provisions*:

The Subcontractor agrees—

a) To be bound to the Contractor by the *terms of the Agreement, General Conditions,* the Drawings and Specifications, *and to assume toward him all the obli-*

gations and responsibilities that he, by those documents assumes toward the Owner.

c) * * *

The Contractor agrees—

d) *To be bound to the Subcontractor by all the obligations that the Owner assumes to the Contractor under the Agreement, General Conditions of the Contract, the Supplementary General Conditions, the* Drawings and Specifications, *and by all the provisions thereof affording remedies and redress to the Contractor from the Owner.*

* * *

l) That no claim for services rendered or materials furnished by the Contractor to the Subcontractor shall be valid unless written notice thereof is given by the Contractor to the Subcontractor during the first 10 days of the calendar month following that in which the claim originated."

Also Section 6 of the said insertions by the Contractor, namely 2-A states:

"6. The Subcontractor must have sufficient men, materials, and equipment on the job at all times in order to properly carry out the work (in the judgment of the contractor). Should the Subcontractor at any time delay the progress of the work (in the judgment of the Contractor) then the Contractor has the right to hire men and equipment and to buy all necessary materials in order to carry on the work properly, and to charge all costs involved in doing so to the Subcontractor; *it being only necessary for the Contractor to notify the Subcontractor by means of the "three days' notice" by registered mail* to the Subcontractor's address, *in order to exercise the above mentioned right.*" (Emphasis added.)

11. Paragraph 7 alleged Defendant Contractor in default of payment according to its contracts and under such

bond contract accepted by the Plaintiff herein for the benefit of Use-Plaintiff and other subcontractors similarly situated, such subcontractors obtained a right to sue on such bond furnished by Defendant's sureties herein pursuant to Title 40, Sections 270a; and 270b, United States Code.

12. Paragraph 8 alleged one year had not elapsed, showing compliance with said Section 270b.

13. Paragraph 9 alleged work and labor had been performed and equipment furnished in the Southern District of Ohio in conformity with said Section 270b (b).

14. Paragraphs 2, 3, 4, 5, as well as 1, of the Second Count alleged a separate claim for payments under a separate written instrument for correction of a pier hole location and not under subcontract 251-3.

15. The Second Claim of the Use-Plaintiff alleges jurisdiction of the case under said Sections 270a; and 270b.

16. Paragraph 5 states no time as specified for commencement nor completion of the work and that Use-Plaintiff offered to commence work on February 12, 1963 with approval of Defendant Contractor.

Paragraph 7 alleges the defense of adverse weather under said contract DA-15-029-ENG-6241 to the claim of Defendant Contractor that Use-Plaintiff had failed to perform its contract but that Use-Plaintiff continued to perform beyond those obligations because of the special requests of Defendant.

Paragraphs 8 and 11 allege that despite adverse weather delaying Use-Plaintiff, Defendant Contractor insisted it had a claim against Use-Plaintiff in that Use-Plaintiff was stated as not keeping sufficient men and equipment on the job; and terminated the balance of Use-Plaintiff's work by a letter of notice dated March 7, 1963 and which letter was not delivered to Use-Plaintiff until March 11, 1963; that

Defendant had prior thereto engaged another subcontractor to replace Use-Plaintiff on or about March 3, 1963 and had entered into an agreement dated March 8, 1963.

Paragraphs 9 and 10 of said Second Claim alleged claims Use-Plaintiff had against Defendant Contractor and which claims would be defenses in favor of Use-Plaintiff under Clause 4 of Contract DA-15-029-ENG-6241 against any alleged delay, and which claims as well as those allegedly of Defendant Contractor were subject to arbitration, but for the inclusion of DA-15-029-ENG-6241, its terms, conditions and remedies into the subcontract; as well as those special provisions of subcontract which confirmed that the contract DA-15-029-ENG 6241 would govern.

WAIVER

The affidavits annexed hereto reflect the actions of the Use-Plaintiff and Defendant Contractor as follows:

1. The Defendant Contractor breached its own contract (251-3 subcontract), by requiring Use-Plaintiff to perform beyond those requirements imposed by such contract and by the contract DA-15-029-ENG-6241, and by the Defendant acknowledging that such Defendant had a claim or controversy against the Use-Plaintiff but by said Defendant refusing and failing to call for arbitration at any time.

2. The Defendant Contractor breached its own agreement to arbitrate, if there was such a requirement on the parties to arbitrate, in that Defendant submitted its claim to Use-Plaintiff to provide for a performance bond, and to terminate Use-Plaintiff's work balance by written notice, without requiring arbitration of such claim, resisted by Use-Plaintiff.

3. The Defendant breached its own agreement not only as to give proper notice to Use-Plaintiff, but also Defendant Contractor's obligation to arbitrate any claim of lack of

sufficient men and equipment, when such Defendant entered into a contract with another subcontractor, on or about March 3, 1963, four days before date of the letter of Defendant, and 8 days before Use-Plaintiff received such letter of notification. That Defendant should have firstly, if it had a justifiable claim against Use-Plaintiff, have notified Use-Plaintiff first and then hired other persons and equipment following three days notice.

4. That Defendant breached its own agreement with Use-Plaintiff that when contacted by Counsel for Use-Plaintiff, the President of Defendant Contractor, one James Conforti, Jr. met with such counsel at Dayton, Ohio on March 21, 1964 and discussed ways to settle the dispute between Use-Plaintiff and such Defendant, and when approached with the method of using U. S. governmental administrative procedures set forth in said contract #DA-15-029-ENG-6241, and when asked permission to institute such procedure as Use-Plaintiff had no privity of contract with the United States whereas Defendant did, and said President of Defendant advised that he would firstly have a letter on behalf of Use-Plaintiff to the effect that Defendant would not be deemed by Use-Plaintiff to have prejudiced Defendant's rights by pursuing such administrative action before the Contracting Officer at Louisville, Kentucky under the procedures set forth in such Principal Contract. That certain meetings were held between counsel for Use-Plaintiff and Defendant, namely said president and a Vice President, John Nelson at New York City, State of New York, all to the effect to induce Use-Plaintiff in the belief Defendant would institute such action for administrative relief; that counsel for Use-Plaintiff had telephoned conversations with Defendant through its said officers on various occasions between the points of Cincinnati, Ohio and New York City; between Washington, D. C. and New York

City and between Dayton, Ohio and New York City. That as time approached for termination of the right of Use-Plaintiff to file suit on the bond of Defendant for payment, that Defendant represented to Counsel for Use-Plaintiff that Defendant would supply the bond number and the names of the sureties, until several days before the suit herein was instituted. That on March 25, 1964 Use-Plaintiff submitted to Defendant its written statement that joining in such action for administrative relief on behalf of Defendant, would not be held as a waiver of right of Defendant to bring claims against Use-Plaintiff if Defendant might have such or any claim. That Use-Plaintiff had communicated to Defendant that as time for filing suit on the payment bond of Defendant was terminating, that Use-Plaintiff would attempt to institute the suit to protect itself, and during such interim Use-Plaintiff and Defendant might seek an adjudication of the right of Use-Plaintiff before the Contracting Officer at Louisville, under proper contract administrative procedures, until several days before termination of Use-Plaintiff's right to enforce payments rights on said bond through court action, at which time Defendant failed, neglected and refused, to supply such bond, number, name of sureties or terms thereof to Use-Plaintiff. That because of such unfair dealings of a large corporate Defendant having many experiences with governmental procedures and construction contracts whereas Defendant suffered its first experience under a United States government contract, and attempted to perform fully all the terms and requirements written therein as well as those additionally imposed by Defendant, and looking to Defendant to obtain corrective relief for Use-Plaintiff under the remedial sections of Contract DA-15-029-ENG-6241 as only Defendant had privity of contract with the United States of America; Use-Plaintiff was induced by the actions

of Defendant repudiating the requirements placed on Defendant and to attempt the only method remaining to Use-Plaintiff: to file suit in court on the payment bond of Defendant and forego administrative relief under the Principal contract as well as any possible relief under said subcontract, of which no remedy existed.

4. That Defendant waived any right it ever had, by unilaterally inserting into such subcontract the requirement that the Contract DA-15-029-ENG-6241 would govern the rights of the parties, and the additional provisions into such subcontract, confirming such specially typed requirement.

5. That under the "Standard form of General Conditions of the Contract of the American Institute of Architects' requirements, requiring timely notice of arbitrations, as Section 40 thereof states:

> "Notice of the demand for arbitration of a dispute shall be filed in writing with the other party to the contract, and a copy filed with the Architect. The demand for arbitration shall be made within a reasonable time after the dispute has arisen; in no case, however shall the demand be made later than the time of final payment, except as otherwise expressly stipulated in the contract. . . ."

THE LAW

Title 40, Section 270b (b) . . .

> "Every suit shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy, but no suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by

him. The United States shall not be liable for the payment of any costs or expenses of any such suit."

ARTICLE III, SECTION 2, Constitution of the United States of America states:

> "Section 2. The judicial power shall extend to all Cases in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties, made or which shall be made under their Authority; . . . to Controversies in which the United States shall be a party; . . . ."

Title 28, Section 1345, United States Code, states:

> "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil suits, actions or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress."
> (see United States Fidelity & Guaranty Co. v. United States, 204 U.S. 349; 27 S. Ct. 381, 51 L. Ed. 516, to the effect that suit on a surety's bond on behalf of persons supplying labor or materials, and brought in the name of the United States, that such Plaintiff is a real and not merely a nominal party)

TITLE 9; ARBITRATION, Section 2, United States Code states:

> "A written provision (in any maritime transaction or a contract evidencing a transaction involving commerce) to settle by arbitration a controversy thereafter arising, out of such contract, or transaction or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to the arbitration in existing controversy arising out of such contract, transaction or refusal shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 3 of said Title states:

> "If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such agreement, shall on application of one of the parties, stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, *provided the applicant for the stay is not in default in proceeding with such arbitration.*" (Emphasis added).

TITLE 28, Section 1352 United States Code states:

> "The District Courts shall have original jurisdiction concurrent with State Courts, of any action on a bond executed under any law of the United States."

APPENDIX, RULES AND REGULATIONS IMPLEMENTING TITLE 41, PUBLIC CONTRACTS, states:

> "Section 52.6 DISPUTES
> All questions and disputes with respect to contract performance, payment and procedure should be referred to the contracting officer concerned, through an inspector if available at the premises, in the absence of a special instruction or notice received in particular cases. Determinations of the contracting officer are ordinarily reviewable, in the manner prescribed by the Secretary of the Treasury or such representative as he may designate from time to time. No special forms are required to submit questions, disputes and claims, or appeals from the determination thereof. However, claims for amounts due deceased contractors must be filed on Standard form 1055 (Revised), 'Claim against the United States for amounts due in the case of a Decedent'."

TITLE 9 ARBITRATION, SECTION 4. FAILURE TO ARBITRATE UNDER AGREEMENT: PETITION TO UNITED STATES COURT HAVING JURISDICTION FOR ORDER TO COMPEL ARBITRATION: NOTICE AND SERVICE THEREOF: HEARING AND DETERMINATION, states:

"a party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration may petition any United States District Court which, save for such agreement would have jurisdiction under Title 28, in a civil action or in admiralty, of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in the manner in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing arbitration is filed. If the making of the arbitration agreement, or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within the admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default, may, except in cases of admiralty, on or before the return day of the notice of the application, demand a jury trial of such issue or issues, and upon such demand, the court shall make an order re-

ferring the issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement for arbitration was made or that there is no default in the proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with arbitration in accordance with the terms thereof."

RULES OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF OHIO, RULE 7, MOTION AND MOTION DAYS:

"1. There shall be filed with each motion a brief statement of the grounds of the same, with citations of authorities relied upon, and failure to do so shall be good ground for striking the motion from the files for want of prosecution. . . ."

LOCAL NO. 1505, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO, INTERVENOR VS. LOCAL LODGE OF DISTRICT 38 of THE INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO, ET AL., Raytheon, United States Court of Appeals First Circuit, May 3, 1962, 304 F2d 365, held:

"We believe that the exclusive jurisdiction to resolve the conflict between the parties is within the Labor Board whose certifications have permitted these overlapping claims. It is true that no unfair labor practice has been committed. . . . Even had there been, this might not pre-empt the District Court's jurisdiction 29 U.S.C.A. #185.

. . . A union by contract with an employer cannot define the scope of that certification. That is the

court's function . . . Not only has the Board made necessary clarifications in the past . . . but jurisdictional disputes between unions are precisely it's province. . . . It is appropriate that its jurisdiction be exclusive."

LOCAL NO. 725, INTERNATIONAL UNION OF OPERATING ENGINEERS VS. STANDARD OIL COMPANY OF INDIANA, District Court North Dakota, 1960; 186 F. Supp. 895 which held:

"1. Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to do. 'For arbitration is a matter of contract and a party is not required to submit to arbitration any dispute which he has not agreed so to submit."

"2. The courts have the exclusive jurisdiction to determine whether the reluctant party has breached its promise to arbitrate — this is not a question to be up to the arbitrator . . ."

"6. The arbitration agreement being a matter of contract should be interpreted in accordance with the intentions of the parties as therein expressed and in the light of the facts and circumstances surrounding the negotiations for and execution of the agreement."

"A specific collective bargaining agreement may exclude contracting out from the grievance procedure or a written collateral agreement may make clear that the excluding out was not a matter of arbitration. In such a case a grievance may not when contracting out be arbitrationable."

RADIATION SPECIALTY COMPANY VS. CANNON MILLS, Circuit Court of Appeals, 4th Circuit, 1938; 97 F2d 318 which held on the facts where the Defendant made an election not to seek arbitration initially:

"Here when the Plaintiff chose to ignore the arbitra-

tion clause in the sales contract, the Defendant did not immediately, as was its duty as if it intended to rely on the arbitration clause, assert its intention to enforce the arbitration; on the contrary the Defendant appeared and filed an answer to the complaint . . . More than three months afterwards the Defendant appeared and filed a motion for an order for continuance that a witness was absent . . . and it was not until six months afterwards and on the day expressly agreed upon that the trial was to be had that the Defendant without giving notice filed its motion to stay the trial pending arbitration which it then sought to enforce.

By its course the Defendant waived its right to arbitration under the clause in the contract and was in default in proceeding with arbitration and in the case of ZIMMERMAN VS. COHEN, 236 NY. 15, 139 NE 764, will be found a discussion of similar facts. There the court said, page 765: Plaintiffs by bringing the action ignored this provision of the contract; they made no reference to it in their complaint. Defendants under provisions of the arbitration law could have applied to the court to enforce arbitration and stay all proceedings in the action and instead of doing so the Defendant answered; the Defendant went even further and made a counterclaim setting up a demand for judgment against the Plaintiffs in a large sum . . . . Whatever right the Defendant might have had under the arbitration clause and the arbitration law to enforce arbitration he deliberately waived; he chose and elected to proceed by action in court for the determination of the respective claims. While the Arbitration Law provides for the enforcement of arbitration agreements there is nothing in the law which prevents the parties agreeing between themselves to resort to any other method of settlement; the law does bar the parties from coming into the court of the state if they mutually choose to do so."

AMERICAN GUARANTY COMPANY VS. CALDWELL, Circuit Court of Appeals, 9th Circuit, 1934 wherein a party agreed that a certain arbitration method would be followed; however when the claim or dispute arose that party did not follow the method of arbitration and the method of arbitration set out in the contract was abandoned. That court held:

> "The Federal Court acquired jurisdiction of the proceedings when confirmation of the arbitrators' award was transferred thereto from the state court had jurisdiction to set aside the first award . . . Courts generally will not construe arbitration agreement as ousting them of jurisdiction unless such construction is inevitable, TITLE 9 ARBITRATION ACT, U.S. C.A. Section 1 et sequor."

UNIAO DE TRANSPORTADORES PARA IMPORTACAO E COMMERCIO LTDA COMPANHEA DE NAVAEGACAEO CARREGADORES ACRRAGADORES, District Court of New York, 1949; 84 F. Supp. 582 which held under an agreement to arbitrate:

> "Under the Federal Arbitration Act an arbitration agreement may be repudiated, waived or abandoned by one or both of the parties. But even in such case where one party seeks to do so, the other has the right to plead the agreement as a defense and such a stay does not oust the court of jurisdiction but provides for maintaining its jurisdiction."

PA THE LABORATORIES VS. DU PONT FILM CORPORATION, District Court of New York, 3 Federal Rules Decisions 11, January 16, 1943 and where the Defendant agreed simultaneously with Du Pont De Nemours to purchase its supplies from such company and which agreement stated that in the event of a dispute the matter

should be referred to the firm of Price & Waterhouse as to costs, as a defense to the suit and order for subpoena duces tecum issued by a Master Commissioner at request of Plaintiff; held:

> "Whether Section 12 is enforceable or unenforceable arbitration clause or whether it is a clause for the reference of an incidental issue, it is nevertheless subject to waiver I have concluded that the Defendant has waived whatever right it had thereunder. . . . It was on Defendants own motion that a master be appointed to take testimony as to costs and this would mean that Price Waterhouse & Co. would have to perform the same function that as to some of the issues already being heard by the special master. It is apparent that the Defendant's request has not been timely made. RADIATOR SPECIALTY COMPANY VS. CANNON MILLS, 4th Cir. 1938, 97 F2d 318, 117 ALR 299. . . ."

TRANSCONTINENTAL & WESTERN AIRLINES VS. PARKER, C. C. of Missouri, 1944, 144 F2d 735 wherein the employer and decedent agreed that death benefits would be payable in the maximum amount under the law of Missouri and such payments under such workmen's compensation to be payable to employee or his dependents as provided in said law. The contract also provided for arbitration of disputes between the employer and employee, otherwise than as specifically provided shall be determined by a contracting officer of the government or state authorized representative. On action by the widow of decedent and the Defendant did not file an answer but filed its motion for a stay of the proceedings under Section 3 of Title 9, Arbitration Action, asking for arbitrations. That court held the following:

"neither the employee nor the beneficiary had contracted with the employer for submission of such dispute to the arbitration. If the parties to the contract of employment had intended to include such dispute in the arbitration clause, the words "between such employer and employee" should have been omitted from the clause. There is no basis for assuming that therein the clause is not fully and accurately written to express the intent of the parties to the contract. . . . . It is of course that courts are without power to modify contracts or to distort the plain meaning of the language used by the parties to them."

LOCOMOTIVE COMPANY VS. GYRO PROCESS COMPANY ET AL, United States Court of Appeals, 6th Circuit, November 24, 1950; 185 F2d 316; wherein Gryo Process instituted suit in a Michigan court for breach of contract and Chemical Process joined in such, and Locomotive filed its petition in the Federal District Court for a stay of the proceeding in accordance with Section 4 of Title 9, Arbitration Act and contended that such section did not permit the court to determine a waiver of the agreement for arbitration and the non-compliance therewith are in issue and that if the court finds that if neither of such facts are in issue then the court must issue an order for arbitration: Held:

". . . We do not agree. We stated on the former appeal that the contract right of arbitration could be waived and we have adhered to that conclusion. GALION IRON WORKS VS. ADAMS, 7th Cir. 128 F2d 411, 413. . . . Section four of the Act merely provides that the procedure for enforcing the right provided by the contract, if that right although if originally existing has been lost and does no longer exist, there is nothing for Section four to enforce. Filing of the original action by Gyro was notice to Locomotive that Gyro was refusing to arbitrate the

dispute under the arbitration agreement . . . Locomotive could have and should have decided at that time whether it would insist on which of the two methods of procedure it would elect to follow; either insist on the contract right of arbitration or prepare for trial by jury. The two methods are inconsistent enough to require an election between them. It made no attempt to enforce its right under present section four of the act until the present action was filed. It did not apply for a stay of proceeding under Section 3 of the Act . . . We agree with the trial judge that such conduct in the trial court amounted to a relinquishment of the right to arbitrate. . . .

It is true that an executory waiver being in the nature of a promise for a contract must be supported by consideration to be enforceable; but a waiver taking on the nature of an election, like an election, needs no consideration and cannot be retracted; it takes on the nature of an executed transaction."

AMERICAN SUGAR REFINING COMPANY VS. THE ANACONDA, Circuit Court of Appeals of Florida, 1943, 138 F2d 765; affirmed 64 S. Ct. 863; 88 L. Ed. 1117. The charter party agreement provided for arbitration and Defendant excepted to the jurisdiction of the court of the subject matter insisting the agreement to arbitrate ousted the court of jurisdiction. Held:

"The Act (Arbitration Act of the United States) was passed not to oust the court of jurisdiction but to provide for maintaining their jurisdiction while at the same time recognizing arbitration agreements are affirmative defenses and providing for a forum for their specific enforcement. . . . The purpose and effect of Section 8 was to leave in no doubt by Section 4 conferring such right for enforcement of the arbitration agreement would be available as well in suits where property was not seized as in those suits where property was seized. Courts will not construe arbitra-

tion agreements of ousting them of jurisdiction unless the construction is inevitable. . . . The agreement did not oust the jurisdiction to entertain the suit. It did not give the appellee the right to have the suit dismissed. The judgment dismissing the suit was wrong."

MURRAY OIL PRODUCTS COMPANY VS. MITSUI & CO., Circuit Court of New York Appeals, N.Y., 1944; 146 F2d 381. Suit on an oil purchase agreement containing an arbitration clause; held:

"That a provision in a contract containing an arbitration clause affects only the remedy and it is not governed by the law of the state wherein the contract was made. If the provision in the New York contract requiring any dispute arising out of the contract to be settled by arbitration was not a condition precedent, it was not a bar to an action to litigate at common law on the contract regardless of its legality."

UNITED STATES FOR THE USE AND BENEFIT OF H. W. MOSELEY VS. ELECTRONIC & MISSILE FACILITIES, INC., ET AL, Supreme Court of United States, 1962 Term, held:

"In denying the action on the motion the District Court held that the Arbitration Act did not apply here since any other holding would nullify the provisions of the Miller Act. . . . We agree that . . . fraud in the procurement of an arbitration contract like fraud in the procurement of any contract makes it void and unenforceable and that this question of fraud is a judicial one which must be determined by the court. To allow this question to be decided by arbitrators would to that extent be to enforce the arbitration agreement even though steeped in the grossest of fraud."

CONCLUSION

1. That if there was an agreement of the parties for arbitration initially, then by agreement of the parties, particularly by the unilateral action of the Defendant Contractor of insorporating the administrative procedures under such contract of the Government and Defendant #DA-15-029-ENG-6241, as modifying and cancelling such provision; that the section of the subcontract Use-Plaintiff specifically nkew the Use-Plaintiff was agreeing to did provide for U. S. governmental administrative remedies and not for arbitration.

2. That Defendant had three courses open to it, as it could have initially attempted to arbitrate its earlier claims against Use-Plaintiff, whereas instead, it refused to heed the claims of Use-Plaintiff for removal of the wires, and the extreme adverse weather; and instead of arbitrating such claims as well as any imagined claims of its own Defendant contractor elected to terminate the contract, at the same time urging Use-Plaintiff to perform without the benefit of any contract, contrary to any requirement for arbitration, as well as contrary to the rights of the United States government, Section 21, (g) of said contract.

3. That Defendant waived any possible right to arbitration, if such could be deemed a part of the contract, by inducing Use-Plaintiff to negotiate with Defendant on the false promise that Defendant would permit the Use-Plaintiff to join with Defendant to seek administrative relief under the provision of contract DA-15029, ENG- 6241; as well of the conduct of the Defendant, well versed in U. S. governmental procedures from prior multi contracts, to attempt to cause Use-Plaintiff to go beyond the statutory time for instituting suit on the payment bond supplied by Defendant.

5. That the Defendant waived its right under the very General Conditions of the Contract of the American Institute of Architects requiring timely demand for arbitration as above set out.

6. That Defendant was a party breaching its own agreement for arbitration if such might be deemed a part of the subcontract by not calling for timely arbitration but by arbitrarily and unilaterally taking its own way in the matter, despite the other terms of the prime contract and the sub-contract, and being so in default, and particularly in default of payment of the separate written agreement for correction of a pier hole location; not subject to the terms of the subcontract, and doubtful of government of the terms and performance by even the Prime contract, Defendant could not comply with the terms of Section 3 of the Title 9 ARBITRATION ACT, U.S.C.

7. Furthermore this contract obligation of the Defendant under the prime contract to Use-Plaintiff and likewise under the special written agreement as well as that of the subcontract required not arbitrators unversed in law but the determination of the court itself in construing the orders and regulations of the Secretary of the Air Force, of the comptroller-general; Board of Contract Appeals, Engineering Corps, Court of Claims and Federal Courts of Appeal all of which are highly sophisticated determinations of Federal Common Law and do not include "commerce" nor maritime jurisdictional problems, as, or such contracts relating to such two classes requiring arbitration under Section 1 of Title 9, Arbitration.

8. Furthermore Use-Plaintiff is highly prejudiced if its sole action under any of its contracts might be dismissed as the Defendant induced Use-Plaintiff to delay any filing on the bond pursuant to Section 270 b of Title 40 until

the day before the statutory time limit ran, and Use-Plaintiff would have no remedy against the Defendant's sureties.

Furthermore the actions of the parties themselves, the Defendant first and on many occasions and Use-Plaintiff thereafter by filing suit and by acquiescing in seeking administrative relief and by conferring with Defendant's principal officers, as well as supplying such requested letter to Defendant, and relying on Defendant to institute administrative action directly with the Contracting officer and the Board of Contract Appeals under the provisions of Prime Contract DA-15-029-ENG-6241 and the Statutes, Rules and Regulations of the United States Government in such cases made and provided.

9. That Defendant in attempting to invoke the equity powers of the District must do equity itself and not enrich itself by if not its own wrong, then by its unfair conduct and dealings.

10. That Defendant did not comply with the Statute governing arbitration and failed, neglected and refused to file timely its petition for arbitration, if it ever could be deemed to have had such right under its said subcontract, and in the long delay caused Plaintiff to under great expenses, whereas and in fact the motion of Defendant for a stay pending arbitration is not the procedure required under Section 4 of Title 9 Arbitration Act, which requires a petition of a party not in default, with service of notice timely made and pursuant to the Federal Rules of Civil Procedure, none of which Defendant had done.

11. That the motion of the Defendant should also be overruled because of noncompliance with the very rules of the Court wherein Defendant is asking assistance in not attaching authorities to support its motion, despite the sworn verifications of the complaint of Use-Plaintiff.

WHEREFORE Use-Plaintiff through its counsel earnestly prays the court to overrule the motion of Defendants herein and to retain jurisdiction of the case and the cause of Use-Plaintiff under the authorities of the Statute, rule and authorities above submitted.

Thomas F. Lazaron of Thomas & Lazaron,
Attorneys for Plaintiff (Use)
105 Rookwood Building, Cincinnati 2, Ohio

PROOF OF SERVICE

This is to certify that I, Thomas F. Lazaron, one of attorneys for Use-Plaintiff herein, have served a copy of the foregoing Memorandum upon the law firm of Kuhns, Kennedy & Platenburg, Attorneys for Defendant at their office at 1506 Hulman Building, Dayton 2, Ohio on June 24, 1964, by personal delivery by said Thomas F. Lazaron.

Thomas F. Lazaron of Thomas & Lazaron,
Attorneys for Use-Plaintiff
105 Rookwood Building, Cincinnati, Ohio

AFFIDAVIT OF THOMAS F. LAZARON SUPPLEMENTING MEMORANDUM OPPOSING MOTION OF DEFENDANT FOR STAYING PROCEEDINGS AND FOR ARBITRATION

(Filed April 27, 1964.)

STATE OF OHIO
SS:
COUNTY OF BUTLER

Thomas F. Lazaron being first duly sworn according to law deposes and says that he has served as one of the attorneys for Use-Plaintiff from the inception of employment of counsel by Keller Pier Drilling Company, and that he is fully aware of all phases of the litigation between the

said various parties, and that to the best information and belief of said affiant, Defendant Contractor never requested nor made demand on Use-Plaintiff for arbitration of the disputes existing between the said parties; that of his own personal knowledge affiant knows he met with James Conforti, Jr., Esquire who is also President of Defendant contractor, in the City of Dayton on March 21, 1964, wherein Defendant and counsel for Use-Plaintiff discussed proper methods of settling the dispute arising under the provisions of Contract DA-15-029-ENG-6241 and that at no time did such officer make demand for arbitration; that as the meeting broke up, and understanding said James Conforti, Jr. also was an attorney of the State of Ohio, on being asked if said "affiant didn't believe that in order to be able to file suit under the 'Miller Act' it would appear to James Conforti, Jr., Esq., that one should first seek arbitration," said affiant, also an Attorney at Law of the State of Ohio replied that in his "opinion the procedure would appear to be administrative action under the institution and provisions of Contract #DA-15-029-ENG-6241, and under the 'Miller Act'."

/s/ Thomas F. Lazaron

Sworn to before me and subscribed in my presence this 24 day of June, 1964.

/s/ Helen Johnson
Notary Public in and for Butler County, Ohio
My Commission Expires July 14, 1967

(Seal)

ORDER OF UNITED STATES DISTRICT COURT

(Filed January 11, 1965.)

On June 9, 1964 the Court issued an order for the use plaintiff to show cause why this action should not be dismissed. Subsequently the use plaintiff filed a memorandum which was responded to by defendants. The Court has carefully considered this matter and concludes that this action should be dismissed.

The Court is compelled to reach this conclusion because of the broad arbitration clause which is contained in the original contract. That clause provides:

> "*Any* controversy or claim arising out of or relating to this contract, *or the breach thereof,* shall be settled by arbitration in accordance with the Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof." (Emphasis added).

Accordingly, the use plaintiff's complaint is hereby DISMISSED and the parties shall proceed with arbitration.

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Chief Judge U. S. District Court

NOTICE OF APPEAL

(Filed February 5, 1965.)

Notice is hereby given that THE UNITED STATES OF AMERICA, Plaintiff For The Use And Benefit of KELLER PIER DRILLING CO., an Ohio corporation hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order of the United States District Court for the Southern District of Ohio, Western Division, Dayton, Ohio, filed January 11, 1965 at 3:45 P.M., dismissing the Use Plaintiff's Complaint and ordering the parties to proceed with arbitration.

/s/ Thomas F. Lazaron, Esq.
of counsel,
Thomas & Lazaron
Attorneys at Law
For Appellant
402 Atlas Building
524 Walnut Street
Cincinnati, Ohio, 45202